Supreme Court, U.S.
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No. 95-916

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARK A. ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a jury instruction equating proof beyond a reasonable doubt with evidence that leaves the jury "firmly convinced" of a defendant's guilt comport with due process, or does such an instruction invite conviction on a standard of proof indistinguishable from the "clear and convincing" test used in certain types of civil cases?

2. Does the statute governing recidivist sentencing in federal drug cases forbid doubling of mandatory minimums when the prior offense was not prosecuted by indictment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK A. ROBINSON respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on July 26, 1995, affirming his conviction and sentence on methamphetamine distribution charges.

OPINIONS BELOW

The not-for-publication memorandum of the United States Court of Appeals for the Ninth Circuit (Skopil, Boochever and Thompson, JJ.), was filed on July 26, 1995. The disposition is noted at 61 F.3d 914 (text in WestLaw and on CD-ROM); a copy is Appendix A to this petition. There is no published opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 26, 1995. Appendix A. A timely petition for rehearing was denied on September 8, 1995. Appendix B. This petition is filed within 90 days of that date. Rules 13.1, 13.3 (1995 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

At the time of the offense underlying this petition, **Section 841(b) of Title 21, United States Code**, provided the penalties for drug distribution charges, in the following terms, insofar as pertinent here:

> (b) Except as otherwise provided ..., any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1) * * * *

(B) In the case of a violation of subsection (a) of this section involving --

* * * *

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years .... If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs ... or ... stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment .... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of super-

vised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Section 851(a) of Title 21, United States Code, provides, in pertinent part:

> (1) No person who stands convicted of an offense under this part [of Title 21] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court ... stating in writing the previous convictions to be relied upon. ...
>
> (2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment of the offense for which such increased punishment may be imposed.

The Fifth Amendment to the United States Constitution provides, in part: "No person shall ... be deprived of ... liberty ... without due process of law ...."

STATEMENT OF THE CASE

This petition arises from the trial and sentencing of Mark A. Robinson for sales of methamphetamine.

a. Procedural History

After a four-day jury trial held in early May, 1993 (Hon. Fred L. Van Sickle, U.S.D.J., presiding), petitioner was convicted on five counts of a seven count indictment. The jury found him not guilty on Count Seven, using or carrying a firearm. CA9 E.R. 94 (Dkt. No. 61).[1]

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[1] Count Five, one of the two felon-in-possession counts, was severed before trial at the prosecutor's request; E.R. 91 (Dkt. Nos. 23-24); and was dismissed at sentencing. E.R. 32, 71 (Sent. Tr.).

Prior to trial, the prosecution filed an Information to Establish Prior Convictions, pursuant to 21 U.S.C. § 851. E.R. 4-5. The Information alleged that petitioner had been convicted in the State of Washington, in June 1989, of possession of heroin, a felony. On April 7, 1993, the prosecution filed an Amended Information, alleging the same prior conviction but specifying that the substance which petitioner had pleaded guilty to possessing had been methamphetamine, not heroin. E.R. 6-7. No response to these Informations was filed by the defense. As noted in the Pre-Sentence Investigation Report ("PSI"), this was a conviction for simple possession of 2.5 grams, not for distribution, and without intent to distribute; the

_____(cont'd)

"E.R." refers to the Excerpts of Record filed in the court of appeals.

conduct in question would be rated a misdemeanor in federal law, although it is a felony in Washington. See 21 U.S.C. § 844. The sentence in the prior case was 10 days in jail "converted" to one day in jail and 72 hours of community service, plus a year's probation, which petitioner successfully completed. PSI, at 7-8. Based on this prior felony conviction, the five-year mandatory minimum term provided in 21 U.S.C. § 841(b)(1)(B)(viii) for Count Three was increased to ten years.

Judge Van Sickle sentenced petitioner on August 12, 1993. A defense argument for downward departure, based on petitioner's severe kidney disease, from which he had suffered all his life, resulting not only in physical impairment but also in mental limitations from brain damage caused by high childhood fevers,

was rejected based on the applicability of the mandatory minimum. E.R. 24-60, 67-69. The court imposed the minimum ten-year term of imprisonment,[2] waiving any fine due to inability to pay. The mandatory sentence would have been only five years if petitioner had not had a prior felony drug conviction.

On appeal, Mr. Robinson raised two issues which he candidly acknowledged were controlled by adverse panel prece-

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[2] The court also imposed an eight-year term of supervised release (three years on Count Six) and special assessments of $250. E.R. 61. Although imposed concurrently on Counts One through Four, the mandatory minimum term technically only applies to Count Three, since that is the only conviction for conduct "involving" a substance containing more than 10 grams of pure methamphetamine, 21 U.S.C. § 841(b)(1)(B)(viii), even as determined in the prosecution laboratory results. On Count Six, the court imposed 24 months, also concurrent. As the PSI noted, after corrections in response to government objections, the guideline range applicable to the other counts (and which would have applied to Count Three but for the mandatory) was 87-108 months.

dent in the Ninth Circuit. One concerned the court's instruction to the jury that proof beyond a reasonable doubt could be defined as the degree of certainty that left one "firmly convinced" of guilt. The other challenged the applicability of the penalty enhancement under 21 U.S.C. § 851. The eight-page, not-for-publication memorandum was filed July 26, 1995; it rejected his arguments on the basis of the precedent petitioner disclosed in his brief. Appendix A.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the judgment of sentence. Fed.R.App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the

indictment alleged the commission of federal criminal offenses.

b. Statement of Facts

The case was based on three undercover buys of methamphetamine from petitioner by a federal ATF agent working in connection with the Spokane Regional Drug Task Force. The first sale, on December 2, 1992, involved 4.5 grams of a substance that was represented to be methamphetamine for $260. Tr. 14-31. The second, on December 22, involved a sale for $240 of about the same quantity of a substance that was laboratory tested as methamphetamine. Tr. 31-34. The third undercover buy involved one-half ounce (about 14 grams) of methamphetamine for $900. During the last exchange, which occurred in petitioner's car, in a semi-dark parking lot of a shopping center, at 11:18 p.m. on January 7, 1993, the peti-

tioner took a 9 mm. handgun out of its case and held it in his left hand throughout the transaction. However, he never pointed it at the agent or said anything threatening. Tr. 34-40, 74, 77.

Officers followed petitioner to a motel room, then obtained a search warrant for the room at about 1 a.m. Tr. 62. After knocking and waiting five seconds without receiving a response, the officers opened the door with a key supplied by the motel management. Petitioner was standing by the bed with his hands up; he was then arrested. Petitioner agreed to cooperate and showed the agents the drugs and the gun, which was unloaded. (No ammunition was in the case either.) Tr. 116-18, 194. Officers also found a driver's license with an alias in Mr. Robinson's wallet. Tr. 198. Some $6,850 in cash was found in the search,

as well as plastic bags, scales, and a plastic envelope and film canister, each with small amounts of methamphetamine and marijuana inside. Tr. 199-219, 228.

REASONS FOR GRANTING THE WRIT

1. The decision below, upholding the "model" jury instruction equating proof beyond a reasonable doubt with evidence that would leave a person "firmly convinced" of guilt, is inconsistent with this Court's decisions concerning the constitutionality of reasonable doubt instructions.

In United States v. Bustillo, 789 F.2d 1364, 1367-68 (9th Cir. 1986), and United States v. Velasquez, 980 F.2d 1275, 1277-78 (9th Cir. 1992), cert. denied, 113 S.Ct. 2979 (1993), the court below upheld § 3.03 of the Manual of Model Criminal Jury Instructions for the Ninth Circuit (West 1992), which equates proof beyond a reasonable doubt with evidence that leaves a jury "firmly convinced" of the defendant's guilt.

That charge is taken from Instruction No. 21 in the Federal Judicial Center Study Committee's Pattern Criminal Jury Instructions (2d ed. 1987). Petitioner's challenge to the instruction on appeal was rejected on the basis of those precedents. Because the challenged instruction destroys any distinction between the proof required to convict in a criminal case and that needed in a civil case where the standard is "clear and convincing" evidence, it "could mislead the jury into finding no reasonable doubt when in fact there was some." Holland v. United States, 348 U.S. 121, 140 (1954). This Court should grant a writ of certiorari to examine the constitutionality of that "model" instruction.

Proof beyond a reasonable doubt necessarily engenders a higher degree of certainty than evidence which is merely

"clear and convincing." Yet the "model" instruction used below told the jury that if they were "firmly convinced" of the defendant's guilt then they had heard proof beyond a reasonable doubt. Because this instruction eliminates the distinction between the two levels of proof, it is plainly erroneous.

The trial judge charged the jury in this case prior to closing arguments. In accordance with the Circuit model, the court instructed the jury that:

> A reasonable doubt is a doubt based upon reason and common sense[,] and it may arise from a careful and impartial consideration of all the evidence or from lack of evidence. It is not required, however, that the government prove guilt beyond all possible doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

E.R. 12-13; Tr. (5/5/93), at 6-7. The defense did not object to this aspect of

the instructions.[3] Because proof beyond a "reasonable doubt" is not properly equated with the condition of being "firmly convinced," this instruction was plain error.

It may be that a trial judge need not define reasonable doubt for the jury at all. See Holland, 348 U.S. at 140, quoting Miles v. United States, 103 U.S. 304, 312 (1881); accord, Hopt v. Utah, 120 U.S. 430, 440-41 (1887). When the trial court elects to offer an elaboration, however, it has discretion to formulate that definition, so long as it

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[3] At the conclusion of the charge, in violation of Fed.R.Crim.P. 30, the lower court did not afford counsel an opportunity to lodge objections to the charge prior to calling for argument. Id. 25; E.R. 14. No opportunity to object was afforded after delivery of the charge but before the jury retired to deliberate, as contemplated by the Rule. The lower court did not again invite counsel's input until after the jury had been directed to begin its deliberations. E.R. 65; Tr. (5/5), at 65.

"avoid[s] defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." Victor v. Nebraska, 511 U.S. --, 127 L.Ed.2d 583, 600-01 (March 22, 1994); accord, Holland v. United States, 348 U.S. at 140 (reasonable doubt instruction not erroneous unless it "could mislead the jury into finding no reasonable doubt when in fact there was some"). An instruction on reasonable doubt must not denigrate or slight the importance of that bedrock concept of due process.

This Court recently has emphasized the Due Process limitations on trial court efforts to define reasonable doubt for a jury. In Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), the Court summarily reversed a conviction where the trial court had instructed the jury in a manner which equated "reasonable doubt"

with "a grave uncertainty," a "moral certainty" and an "actual substantial doubt." These definitions could have misled a reasonable juror into allowing "a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id., 112 L.Ed.2d at 342. See also Victor v. Nebraska, supra. It is impossible to explain how "firmly convinced" can equate with "beyond a reasonable doubt" when "clear and convincing" does not.

As catalogued recently by the D.C. Circuit, "several circuits have criticized reasonable doubt instructions modeled on the [Federal Judicial Center Study Committee's] Pattern Instruction," such as this Court's. United States v. Taylor, 997 F.2d 1551, 1557 (D.C. Cir. 1993). See United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987), cert.

denied, 485 U.S. 934 (1987) (calling delivery of this charge "error"); accord, United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986).[4] Compare United States v. Barrera-Gonzales, 952 F.2d 1269, 1273 (10th Cir. 1992); United States v. Hunt, 794 F.2d 1095, 1100-01 (5th Cir. 1986). Justice Ginsburg's endorsement of the Federal Judicial Center study committee's definition in her Victor concurrence, 127 L.Ed.2d at 601-04, as challenged in this petition,

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[4] The Taylor panel lists an opinion of the First Circuit, United States v. Gibson, 726 F.2d 869, 873-74 (1st Cir.), cert. denied, 466 U.S. 960 (1984), as having upheld this instruction also, but in that case the only point challenged was an addition to the charge proposing certain qualifications "on the other hand." Thus, the conclusion that "when the charge is read as a whole, there was no error," 726 F.2d at 874, can only be viewed as dictum. No argument appears to have been made in Gibson against equating proof beyond a reasonable doubt with evidence which leaves a juror "firmly convinced."

does not discuss the problem of the instruction's resemblance to a civil "clear and convincing" standard.

In Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182 (June 1, 1993), the Court unanimously held that constitutional error in a state trial court's reasonable doubt instruction is reversible per se and cannot be harmless error. The trial court's instruction in this case thus created a "reasonable likelihood," Estelle v. McGuire, 502 U.S. --, 116 L.Ed.2d 385, 112 S.Ct. 475, 482 & n.4 (1991), that the jury reached "a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, supra. Under United States v. Olano, 507 U.S. --, 123 L.Ed.2d 508 (April 26, 1993), an erroneous definition of "reasonable doubt" is plain error.

United States v. Colón-Pagán, 1 F.3d 80 (1st Cir. 1993) (Breyer, Ch.J.).

For these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Ninth Circuit, recognizing the plain constitutional error in the Federal Judicial Center study committee's Pattern Instruction on reasonable doubt, as adopted by the court below.

2. The Court should grant certiorari because the Ninth Circuit's precedent permitting imposition of an enhanced mandatory penalty construes the governing statute in a manner inconsistent with this Court's oft-articulated rules of non-surplusage and lenity.

This Court should also grant certiorari to examine the lower court decisions which construe 21 U.S.C. § 851(a)-(2), the provision which serves to restrict the kinds of prior offenses on which a federal prosecutor can predicate

a request for recidivist sentencing in a drug case. The interpretation by which the panel hearing petitioner's appeal was bound, United States v. Espinosa, 827 F.2d 604, 616-17 (9th Cir. 1987), cert. denied, 485 U.S. 968 (1988), eliminates all meaning from that statute, and improperly resolves a serious ambiguity against the criminal defendant.[5]

Petitioner was subjected to a mandatory minimum ten-year term in this cases as a recidivist based on a single,

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[5] The precedent relied on below has also led other circuits into the same error. See United States v. Harden, 37 F.3d 595, 600-01 (11th Cir. 1994) (agreeing with Ninth Circuit's "carefully reasoned opinion" in Espinosa); United States v. Trevino-Rodriguez, 994 F.2d 533, 536 (8th Cir. 1993); United States v. Burrell, 963 F.2d 976, 992-93 (7th Cir.) (adopting Espinosa's interpretation of § 851(a)(2)), cert. denied, 113 S.Ct. 357 (1992); United States v. Adams, 914 F.2d 1404, 1407 (10th Cir.) ("fully agree[ing]" with interpretation and reasons set forth in Espinosa), cert. denied, 498 U.S. 1015 (1990).

four-year old prior conviction for simple possession of two grams of methamphetamine. He was subject to a sentence only half as long unless 21 U.S.C. § 851 was applicable and properly invoked. That statute does not apply "if the increased punishment which may be imposed is imprisonment for a term in excess of three years, unless the person either waived or was afforded prosecution by indictment of the offense for which such increased punishment may be imposed." Id.(a)(2). The opinion in Espinosa, 827 F.2d at 616-17, held that the phrase "the offense for which such increased punishment may be imposed" refers to the instant federal offense, rather than to the defendant's prior offense. That construction of the statute's ambiguous language is untenable.

The lower court's imposition of a

ten-year term in this case was predicated on a doubling of the mandatory minimum under 21 U.S.C. § 841(b)(1)(B) on the basis that petitioner had a prior felony drug conviction.[6] The lower courts apparently recognized that the enhanced penalties applicable to second offenders under the Controlled Substances Act do not apply automatically whenever the defendant may have a prior drug conviction. To obtain an enhanced, second-offender mandatory minimum sentence, the

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[6] Enhancement under 21 U.S.C. § 841(b)(1) applied (at the time of the 1992 and 1993 offenses involved here), when the prior conviction was for a "felony under any ... law of a State ... relating to ... stimulant substances ...." A "felony" is defined, in id. § 802(13), in pertinent part, as "any ... State offense classified by applicable ... State law as a felony"; methamphetamine is a "stimulant substance" under id. § 802(9)(B),(D). In September 1994, the language of § 841(b) was modified to use the term "felony drug offense" to describe an enhanced-penalty-triggering prior offense; the definition of that phrase was placed in 21 U.S.C. § 802(43)[44], without substantive change.

government and the district court were required to comply with the procedural provisions of 21 U.S.C. § 851. The circuits are in agreement that "Section 851, in conjunction with 21 U.S.C. § 841[(b)], determines how sentencing courts should consider prior federal drug conviction for purposes of enhancing sentences." United States v. Davis, 15 F.3d 902, 915 (9th Cir. 1994).

Because the government neither alleged nor proved that the prior state offense was prosecuted by indictment (or that petitioner had waived indictment in that case), as required under § 851(a)-(2), the Information to Establish Prior Convictions filed in this case was insufficient and should have been dismissed.[7]

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[7] In fact, under Washington State law, only a tiny number of special offenses are prosecuted by grand jury indictment. Routine felonies, such as petitioner's prior drug conviction, are invariably prosecuted by information instead.

Cf. Custis v. United States, 511 U.S. --, 114 S.Ct. 1732, 128 L.Ed.2d 517, 525 (May 23, 1994) (contrasting § 851 with other recidivist provisions which do not prescribe procedures).

Section 851(a) provides, in pertinent part:

> (1) No person who stands convicted of an offense under this part [of Title 21] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court ... stating in writing the previous convictions to be relied upon. ...
>
> (2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment of the offense for which such increased punishment may be imposed.

The Espinosa analysis of this language contradicts two fundamental precepts of statutory construction.

First, the Espinosa panel's reading of § 851(a)(2) renders that entire subsection of the statute meaningless, making that approach presumptively erroneous. Bailey v. United States, 1995 WL 712269 (U.S., filed Dec. 6, 1995), at *6. See also Ratzlaf v. United States, 510 U.S. --, 126 L.Ed.2d 615, 622 (Jan. 11, 1994); Penna. Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Potter v. United States, 155 U.S. 438, 446 (1894).

Under the Fifth Amendment, every federal criminal prosecution for an offense punishable by more than a year's imprisonment requires that the accused either have waived or been afforded prosecution by indictment. The construc-

tion of this statute by which the panel in petitioner's case was bound ignores the point that every offense subject to enhancement under § 851 that results in a potential enhanced term of "imprisonment for a term in excess of three years" is by definition an offense which carries an unenhanced maximum of more than one year (since one half of three years is 18 months).

Therefore, to construe § 851(a)(2) as referring to the instant federal offense rather than to the prior state or federal offense is to render that subsection of the statute utterly nugatory. This basic problem in statutory construction is not addressed in United States v. Espinosa, supra, or the cases which follow it.

Second, the Espinosa panel conceded that the "statutory language is arguably

susceptible to either reading ...." 827 F.2d at 617. That is, it is admittedly plausible, on a purely literal basis, to read "the offense for which such increased punishment may be imposed" as referring to the instant federal offense. It is also plausible, however -- and for the reason just discussed ultimately necessary -- to read that phrase as meaning "the offense on account of which such increased punishment may be imposed." By explicitly resolving what is at best a genuine ambiguity in a criminal sentencing provision in favor of the harsher and broader of the available interpretations, the Espinosa theory violates this Court's repeated insistence on the rule of lenity. See, e.g., Ratzlaf v. United States, 510 U.S. --, 126 L.Ed.2d 615, 625-27 & n.17 (1994) (citing many cases); accord, United

States v. Granderson, 511 U.S. --, 127 L.Ed.2d 611, 626 (March 22, 1994); Hughey v. United States, 495 U.S. 411, 422 (1990); Bifulco v. United States, 447 U.S. 381, 387 (1980).

To refuse application of the second offender enhancement clause of § 841(b)-(1) where the § 851 procedures have not been followed is entirely consistent with the goals and structure of Section 851. The apparent purpose of subsection (a)(2) is to protect a defendant from enhancement on the basis of a minor state offense, simply because that offense is formally classified as a felony, where the decision to charge has not been screened by a grand jury of the defendant's fellow citizens. Subsection (a)(2) thus serves to withhold the application of the enhancement provision, in appropriate cases such as this one, to

prevent a miscarriage of justice that results from the imposition of a disproportionately harsh sentence on a person whose prior record of felony drug convictions is minor compared to that of most recidivists.

The Espinosa panel erred in treating as "anomalous" that the reading of § 851(a)(2) proposed by the defendant there (and by petitioner here) "would exclude from the statute's ambit prior convictions in those states or foreign countries that happen to use a felony complaint [or information] system rather than a grand jury indictment system." 827 F.2d at 617. The panel viewed such exclusions as inconsistent with Congress's intent in 1984 "to broaden the scope of § 841(b)." Id.

But surely it is immaterial whether a court views the plain language of an

1970 statute (such as § 851) as consistent with the spirit of a related 1984 law (§ 841(b), as amended) that did not repeal or amend the pre-existing statute. To the contrary, it is the subsequently enacted provision that is required to interpreted harmoniously with the prior provisions to which it is in pari materia. Gozlon-Peretz v. United States, 498 U.S. 395, 408-09 (1991); Sullivan v. Finkelstein, 496 U.S. 617, 628 n.8 (1990) ("subsequent legislative history" not entitled to "any significant weight"); see also id. at 631-32 (Scalia, J., concurring: subsequently enacted statute on same subject is in pari materia and "should be interpreted harmoniously"). If Congress, in 1970, excluded from exposure to recidivist drug sentencing those whose prior charges had not received the additional nonprosecutorial

screening that a grand jury indictment affords, it is not for any court to reject that restriction. Thus, the Ninth Circuit's policy argument is entirely invalid.

The entire existence and structure of § 851 inherently impedes and limits recidivist sentencing, but that is no reason to reject the less far-reaching reading of subsection (a)(2). Courts are not entitled to presume that a criminal sentencing provision must be given the more onerous of two interpretations. Cf. Busic v. United States, 446 U.S. 398, 408-09 (1980) (rejecting argument for harsher interpretation based on "assumption that ... Congress' sole objective was to increase the penalties ... to the maximum extent possible"). Every element of the statutory analysis adopted below is erroneous under controlling precedent of this Court.

For this reason as well, this Court should grant the writ of certiorari and reverse the judgment below, remanding the case for reduction of sentence.

CONCLUSION

For each of the foregoing reasons, petitioner MARK A. ROBINSON prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming his conviction and sentence.

Respectfully submitted,
LAW OFFICES OF
ALAN ELLIS, P.C.

By: PETER GOLDBERGER
Attorneys for Petitioner

December 7, 1995.

APPENDIX A

61 F.3d 914 (C.A.9 (Wash.) 1995)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 93-30321
v.	)	DC No. CR-93-15-1-FVS
MARK A. ROBINSON, Defendant-Appellant.	)	MEMORANDUM*

Appeal from the
United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge,
Presiding

Submitted May 2, 1995**
Seattle, Washington
Decided July 26, 1995.

Before: SKOPIL, BOOCHEVER, and THOMPSON, Circuit Judges.

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* The panel unanimously finds this case suitable for submission without oral argument pursuant to Fed.R.App.P. 34(a) and 9th Cir.R. 34-4.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Mark Robinson appeals his conviction and sentence for distribution and possession with intent to distribute methamphetamine (21 U.S.C. § 841(a)(1)) and for being a felon in possession of a firearm (18 U.S.C. § 922(g)). We affirm.

DISCUSSION

I. The District Court Did Not Err in Instructing the Jury that Proof Beyond a Reasonable Doubt is Proof that Leaves the Jury "Firmly Convinced" of the Defendant's Guilt

Robinson challenges the definition of reasonable doubt given by the district court to the jury in its instructions. The instruction stated in pertinent part:

> A reasonable doubt is a doubt based upon reason and common sense, and may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. It is not required, however, that the Government prove guilt beyond all possible doubt. Proof beyond a reasonable doubt is proof that

leaves you firmly convinced that the defendant is guilty.

The instruction was taken almost verbatim from Ninth Circuit Model Criminal Jury Instruction 3.03.

Although Robinson had an opportunity to object to the jury instructions, and did in fact take exception to a number of the instructions, Robinson never objected to the reasonable doubt instruction.

When a defendant fails to object to a jury instruction at trial, the instruction is reviewed for plain error. United States v. Ward, 914 F.2d 1340, 1344 (9th Cir. 1990). Reversing a criminal conviction on the basis of plain error is "an exceptional remedy," and should be invoked "'only when it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process.'" Id. (quoting

United States v. Bustillo, 789 F.2d 1364, 1367 (9th Cir. 1986)).

Robinson argues that the instruction is improper because the phrase "firmly convinced" suggests that a defendant may be convicted so long as there is proof of guilt by "clear and convincing evidence," rather than proof beyond a reasonable doubt. Robinson thus contends that the instruction in this case reduced the government's burden of proof and allowed the jury to convict on a lesser showing than due process requires.

As Robinson acknowledges, however, there is clear Ninth Circuit authority to indicate that the reasonable doubt instruction given in this case was not improper. See United States v. Velasquez, 980 F.2d 1275, 1278-79 (9th Cir. 1992) (reasonable doubt jury instruction using the term "firmly

convinced" was not reversible error), cert. denied, 113 S.Ct. 2979 (1993); United States v. Bustillo, 789 F.2d 1364, 1368 (9th Cir. 1986) (reasonable doubt jury instruction containing the term "firmly convinced" was not plain error). Under Velasquez and Bustillo, Robinson's challenge to the jury instruction given in this case fails.

Robinson argues, however, that the holdings in those cases were incorrect and that they should be overturned in light of subsequent Supreme Court decisions. None of the Supreme Court cases cited by Robinson, however, alters the result in Velasquez and Bustillo or requires us to reexamine the holdings of those two cases.

Moreover, a number of other circuits have also upheld jury instructions which use the term "firmly convinced." See,

e.g., United States v. Taylor, 997 F.2d 1551, 1557 (D.C.Cir. 1993) (rejecting argument that "firmly convinced" language lowers the government's burden of proof); United States v. Barrera-Gonzales, 952 F.2d 1269, 1273 (10th Cir. 1992); United States v. Hunt, 794 F.2d 1095, 1100-01 (5th Cir. 1986).

Therefore, in light of Velasquez and Bustillo, and the lack of Supreme Court precedent to dictate otherwise, we conclude that the jury instruction given by the district court was not plain error.

II. The District Court Did Not Err in Sentencing Robinson as a Second Offender under 21 U.S.C. §§ 841(b)(1), 851(a)

The district court sentenced Robinson to a mandatory minimum of ten years imprisonment under § 841(b)(1)(B)-(viii) because Robinson had a prior

Washington state felony conviction for possession of methamphetamine. Robinson argues that the sentence was not authorized under § 851(a) because his prior felony drug offense was not prosecuted by indictment.

Section 851(a) provides in pertinent part:

> (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court ... stating in writing the previous convictions to be relied upon. ...
>
> (2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

21 U.S.C. § 851(a)(1), (2) (emphasis added). Robinson contends that the requirement of "prosecution by indictment" refers to the prior conviction, not the current offense. Thus, he argues that his prior Washington state conviction cannot be used to enhance his sentence because he was prosecuted by information rather than by indictment.

We rejected the identical argument, however, in United States v. Espinosa, 827 F.2d 604, 617 (9th Cir. 1987), cert. denied, 485 U.S. 968 (1988), and held that the statutory requirements of § 851(a)(2) refer to the current drug offense, not the prior state felony drug conviction. So long as the current offense has been prosecuted by indictment, the prior conviction can be used to enhance the sentence under § 851. See id.

Robinson concedes that Espinosa is controlling, but he argues that Espinosa should be overturned in light of subsequent Supreme Court decisions emphasizing the rule of lenity in construing criminal statutes. The rule of lenity, however, which demands resolution of ambiguities in criminal statutes in favor of the defendant, applies only when a statute remains ambiguous after considering the language, structure, legislative history, and motivating policies behind the statute. See Moskal v. United States, 498 U.S. 103, 108 (1990). In Espinosa, after considering the text, structure, and policies underlying § 851(a), the court found that the statute was not ambiguous. Therefore, the rule of lenity is inapplicable in this case where the statute's meaning is plainly discernible.

Every other circuit that has considered the issue has agreed with and relied upon Espinosa in finding that § 851(a)'s "prosecution by indictment" requirement refers to the current offense.[1]

In this case, the current offense was prosecuted by indictment and the government duly filed an information which specified Robinson's prior felony drug conviction as required by § 851(a). Therefore, in light of Espinosa, we

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[1] See United States v. Harden, 37 F.3d 595, 600-01 (11th Cir. 1994) (agreeing with Ninth Circuit's "carefully reasoned opinion" in Espinosa); United States v. Trevino-Rodriquez, 994 F.2d 533, 536 (8th Cir.1993); United States v. Burrell, 963 F.2d 976, 992-93 (7th Cir.) (adopting Ninth Circuit's interpretation of § 851(a)(2) in Espinosa), cert. denied, 113 S.Ct. 357 (1992); United States v. Adams, 914 F.2d 1404, 1407 (10th Cir.) ("fully agree[ing]" with interpretation and reasons set forth in Espinosa), cert. denied, 498 U.S. 1015 (1990).

conclude that the district court did not err in using Robinson's prior conviction to impose a mandatory ten-year minimum sentence.

III. Robinson Cannot Maintain His Ineffective Assistance of Counsel Claim in This Direct Appeal

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Ineffective assistance claims are ordinarily reviewed only in habeas corpus proceedings, rather than on direct appeal, because the claims usually cannot be resolved without the development of facts outside the record. See United States v. Sitton, 968 F.2d 947, 960 (9th Cir.), cert. denied, 113 S.Ct. 478

(1992). When the record on appeal, however, is sufficiently developed to permit consideration of the claim, the court may decide the issue. See United States v. Baldwin, 987 F.2d 1432, 1437 (9th Cir.), cert. denied, 113 S.Ct. 2948 (1993).

The record here is not sufficiently developed to resolve Robinson's claims. Robinson argues that his attorney's performance during the sentencing phase was deficient because he failed to request a continuance in order to obtain the results of an independent lab test of the purity of the methamphetamine. The government's lab report which was admitted into evidence at trial indicated that the batch of methamphetamine purchased from Robinson and the batch seized from his motel room were 90% pure and contained 12.69 and 25.38 grams of

pure methamphetamine, well over the 10-gram quantity required for the statutory mandatory minimum sentence. The defense had the drugs retested at an independent laboratory, but at the time of sentencing, the test results were not back. Defense counsel therefore "reserve[d] the right to make post trial motions" if the test results indicated a different purity level. Robinson argues that his counsel should have asked the court to delay sentencing until the test results had been obtained.

It is not possible to determine on this record, however, how the failure to ask for a continuance prejudiced Robinson. There are no facts to suggest that the independent lab tests produced a purity level significantly lower than that found by the government lab test. The record therefore does not reveal an

error from which we could conclude Robinson received ineffective assistance of counsel.

Robinson also argues that his counsel's performance was deficient because he failed to request a continuance to challenge Robinson's prior conviction before it was used to enhance his sentence. Under 21 U.S.C. § 851(b) and (c), any challenge to a prior conviction that is not made in writing before sentencing is waived. Robinson did not file such a written challenge. At sentencing, Robinson's counsel stated that he had "not had the opportunity to specifically look into this in any detail," but "reserve[d] the right to probably attack a state conviction or another conviction" at a later time. Robinson argues that his counsel was completely unfamiliar with the procedures

for attacking prior convictions in § 851 and that he should have requested a continuance to investigate whether there were grounds for challenging his prior conviction. Again, however, it not clear from this record how the failure to obtain a continuance prejudiced Robinson's case. There is no allegation that Robinson's prior conviction was in fact invalid or subject to attack. Without indicating on what basis he would have challenged his prior conviction, Robinson cannot maintain his ineffective assistance of counsel claim in this direct appeal. Robinson in fact concedes that he "has not made, and cannot on this record make, a showing of prejudice."

Because Robinson's claim of ineffective assistance of counsel requires the development of facts outside the record, we decline to consider his claim.

CONCLUSION

We affirm Robinson's conviction and sentence and decline to review his ineffective assistance of counsel claim.

AFFIRMED.

APPENDIX B

FILED
UNITED STATES COURT OF APPEALS
SEP-8 1995
FOR THE NINTH CIRCUIT
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 93-30321
v.	)	DC No. CR- 93-15-1-FVS
MARK A. ROBINSON, Defendant-Appellant.	)	

Before: SKOPIL, BOOCHEVER, and THOMPSON, Circuit Judges.

The panel has voted to deny the petiton for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.